

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

MILTON B. SCOTT,

Petitioner,

vs.

GARY SWARTHOUT, Warden,

Respondent.

No. C 12-4901 PJH (PR)

**ORDER GRANTING LEAVE  
TO PROCEED IN FORMA  
PAUPERIS, DENYING  
APPOINTMENT OF  
COUNSEL AND FOR  
RESPONDENT TO SHOW  
CAUSE**

Petitioner, a California prisoner currently incarcerated at the California State Prison - Solano has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He also applied for leave to proceed in forma pauperis.

Petitioner was convicted in Contra Costa County, which is in this district, so venue is proper here. See 28 U.S.C. § 2241(d).

**BACKGROUND**

A jury convicted petitioner of murder. He was sentenced to fifty years to life in prison. The California Court of Appeal affirmed the judgment and the California Supreme Court denied review.

**DISCUSSION**

**A. Standard of Review**

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An

1 application for a federal writ of habeas corpus filed by a prisoner who is in state custody  
2 pursuant to a judgment of a state court must “specify all the grounds for relief available to  
3 the petitioner ... [and] state the facts supporting each ground.” Rule 2(c) of the Rules  
4 Governing § 2254 Cases, 28 U.S.C. foll. § 2254. “[N]otice’ pleading is not sufficient, for the  
5 petition is expected to state facts that point to a ‘real possibility of constitutional error.’”  
6 Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir.  
7 1970)). “Habeas petitions which appear on their face to be legally insufficient are subject  
8 to summary dismissal.” *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102,  
9 1108 (9th Cir. 1996) (Schroeder, J., concurring).

10 **B. Legal Claims**

11 As grounds for federal habeas relief, petitioner asserts that: (1) His trial counsel was  
12 ineffective for failing to object to the admission of certain recorded witness testimony; (2)  
13 the trial court erred and violated due process in allowing into evidence certain graphic rap  
14 lyrics; (3) the prosecution committed misconduct in closing arguments; and (4) the trial  
15 court erred in allowing into evidence another witness’ statement, who refused to testify,  
16 violating petitioner’s right to confrontation under the Constitution. These claims are  
17 sufficient to require a response.

18 **C. Appointment of Counsel**

19 Petitioner has also moved for appointment of counsel.

20 The Sixth Amendment’s right to counsel does not apply in habeas corpus actions.  
21 *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). However, 18 U.S.C.  
22 § 3006A(a)(2)(B) provides that in habeas cases, whenever “the court determines that the  
23 interests of justice so require, representation may be provided for any financially eligible  
24 person . . . .”

25 Petitioner has presented his claims adequately, and they are not particularly  
26 complex. The interests of justice do not require appointment of counsel.

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**CONCLUSION**

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2 1. Leave to proceed in forma pauperis (document number 5 on the docket) is  
3 **GRANTED.**

4 2. The motion for appointment of counsel (document number 4 on the docket) is  
5 **DENIED.**

6 3. The clerk shall serve by regular mail a copy of this order and the petition and all  
7 attachments thereto on respondent and respondent's attorney, the Attorney General of the  
8 State of California. The clerk also shall serve a copy of this order on petitioner.

9 4. Respondent shall file with the court and serve on petitioner, within sixty days of  
10 the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules  
11 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be  
12 granted. Respondent shall file with the answer and serve on petitioner a copy of all  
13 portions of the state trial record that have been transcribed previously and that are relevant  
14 to a determination of the issues presented by the petition.

15 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with  
16 the court and serving it on respondent within thirty days of his receipt of the answer.

17 5. Respondent may file a motion to dismiss on procedural grounds in lieu of an  
18 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing  
19 Section 2254 Cases. If respondent files such a motion, it is due fifty-six (56) days from the  
20 date this order is entered. If a motion is filed, petitioner shall file with the court and serve  
21 on respondent an opposition or statement of non-opposition within twenty-eight (28) days of  
22 receipt of the motion, and respondent shall file with the court and serve on petitioner a reply  
23 within fourteen days of receipt of any opposition.

24 6. Petitioner is reminded that all communications with the court must be served on  
25 respondent by mailing a true copy of the document to respondent's counsel. Petitioner  
26 must keep the court informed of any change of address and must comply with the court's  
27 orders in a timely fashion. Failure to do so may result in the dismissal of this action for  
28 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See *Martinez v.*  
*Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

**IT IS SO ORDERED.**

Dated: November 20, 2012.

  

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PHYLLIS J. HAMILTON  
United States District Judge

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